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No. 93-680

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

RICHARD W. HUBBARD, Securities Commissioner of the State of Delaware,

Petitioner,

vs.

OLDE DISCOUNT CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

The two questions presented by petitioner are inappropriate under the criteria outlined in Rule 10 of the Supreme Court Rules, since they are not implicated by the record below. The record below does support the following question:

Whether state officials, acting under color of state law, may circumvent and interfere with a valid arbitration agreement by asserting and interpositioning the civil claim of the party bound to arbitrate in the guise of a state administrative proceeding.[1]

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1. In accordance with Supreme Court Rule 29.1, respondent OLDE Discount Corporation ("OLDE") states that it is a Michigan corporation with its principal place of business in Detroit, Michigan. OLDE Discount is a wholly-owned subsidiary of OLDE Financial Corporation. OLDE Financial Corporation has debentures outstanding which were previously issued in a public offering.

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RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

In accordance with Supreme Court Rule 15.1, a Counterstatement of the Case is necessary because the petition recites as "fact" many assertions which are either not part of the record or were otherwise rejected below. More importantly, the

petition fails to provide the Court with the underlying facts which grounded the decisions below. The "Questions Presented" recited in the petition are not the issues which would be before the Court if a writ of certiorari were issued, since they are derived from misstatements and omissions of fact and assertions of "fact" which improperly posture the record below. For these reasons alone, the petition is devoid of any merit for review and should be denied.[2]

Contrary to the impression left by the petition, the underlying facts and circumstances which gave rise to this action do not relate to the traditional or even *bona fide* exercise of a state's regulatory powers to enforce its securities laws. The record below evidences the improper use of prosecutorial threats and extortion by public officials for the sole purpose of advancing purely private interests and resolving private disputes, in the guise of investor protection. A more appropriate statement of the background, facts and proceedings below demonstrates the absence of any issue warranting review by the Court.

OLDE Discount Corporation ("OLDE") is a securities broker-dealer registered with the U. S. Securities and Exchange Commission and with numerous states, including Delaware. Eugene H. and Carol D. Engelhardt (the "Engelhardts") are

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2. For example, petitioner's Statement of the Case relies heavily upon the allegations contained in the Notice of Intent to Suspend or Revoke Broker-Dealer Registration ("Notice"). (App. 76-88). However, the allegations of wrongdoing contained in the Notice have *never* been findings in the record below. The Notice is significant solely in that petitioner, in the context of an administrative proceeding, sought private relief in the form of rescission on behalf of two investors, Eugene H. and Carol D. Engelhardt, appellants below, who had entered into an arbitration agreement with respondent OLDE. The court below attached particular significance to the fact that the Notice "proposed individual relief for the Engelhardts only." (App. 6). [References to "App." are to the Appendix accompanying the Petition for Writ of Certiorari.]

Delaware residents who opened a joint brokerage account with OLDE. In connection with the opening and maintenance of their account, the Engelhardts signed a brokerage account agreement with OLDE which contains an arbitration clause requiring the Engelhardts to submit to arbitration, any and all controversies or claims arising out of their brokerage transactions or account with OLDE.

In May and June, 1990, the Engelhardts purchased shares of the common stock of Second National Federal Savings Bank ("SNFS") in their OLDE account. Months after that purchase, the market price of SNFS declined. The Engelhardts became dissatisfied with their SNFS purchases, but never submitted a written complaint to OLDE, even though their account agreement expressly required them to do so in writing, within ten days of any disputed transaction. (App. 52). Subsequently, in September 1990, when the market value of their SNFS stock had declined approximately $20,375 from their initial investment, the Engelhardts transferred their SNFS stock out of their OLDE account. (App. 52).

Over a year after their purchase of SNFS stock, in July 1991, the Engelhardts complained to the Division of Securities of the Delaware Department of Justice about their SNFS stock purchases. (App. 5). The Division, primarily through W. Michael Tupman ("Tupman"), a Delaware Deputy Attorney General responsible for securities law enforcement, investigated the Engelhardts' complaint. (App. 5). After completion of a nearly year long investigation of OLDE, in May 1992, Tupman sent OLDE a draft "Notice of Intent to Suspend or Revoke Broker-Dealer Registration" ("Notice"). (App. 53). The Notice read like a private civil complaint of the Engelhardts. It alleged violations of the Delaware Securities Act solely in connection with the Engelhardts' SNFS stock purchases; and sought private relief solely on behalf of the Engelhardts, including rescission of their purchases of SNFS

stock. (App. 6).[3] If filed, the Notice would trigger an administrative proceeding which, among other things, would resolve the Engelhardts' complaint against OLDE. Resolution of that dispute in the state's administrative proceeding would, in turn, circumvent OLDE's right to have the dispute resolved in arbitration, in accordance with the Engelhardts' arbitration agreement.

In an effort to settle the threatened (but not yet initiated) administrative proceeding which had been crafted solely on behalf of the Engelhardts, counsel for OLDE engaged in settlement communications with Tupman. Ultimately, OLDE offered to make a $15,000 contribution to the Delaware Investor Protection Fund (which was to "reimburse" the State for its expenses in the investigation) to resolve any putative public interest in the threatened administrative proceeding, and offered to pay $20,375 to the Engelhardts to settle their private complaint. The offer of payment to the Engelhardts represented the difference between the total price paid for their SNFS stock and the market value of the stock in September, 1990 when they transferred their stock out of OLDE. (App. 6-7). Alternatively, OLDE offered to pay all the filing and forum fees for the Engelhardts' claim to be heard and decided in arbitration. (App.54).

Significantly, it is undisputed that Tupman agreed to accept OLDE's $15,000 contribution to the Investor Protection Fund to resolve and settle any state putative public interest. (App. 7,54). Tupman refused, however, on behalf of the Engelhardts, OLDE's settlement offer and instead demanded complete rescission of the Engelhardts' SNFS stock purchases, as contemplated by the threatened administrative proceeding. (App. 7, 54). Throughout

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3. In July, 1990, the Delaware Securities Act was amended to authorize the Securities Commissioner to award private civil relief to Delaware residents in state administrative proceedings.

the communications with Tupman, OLDE consistently maintained that Tupman and petitioner Richard W. Hubbard ("Hubbard"), the Delaware Securities Commissioner could not properly pursue in any administrative proceeding, private rescissionary relief on behalf of the Engelhardts, since OLDE had a contractual right to arbitrate the Engelhardts' complaint. (App. 7).

The culmination of the settlement discussions between OLDE and Tupman occurred at a meeting on August 5, 1992 between Tupman and representatives of OLDE. At that meeting, it was confirmed that Tupman was acting as the agent of the Engelhardts, representing their personal interests. (App. 55, Resp. App. 1a-8a, 13a).[4] Tupman vehemently expressed his disdain and contempt for arbitration of the Engelhardts' dispute. (Resp. App. 3a, 13a). On behalf of the Engelhardts, Tupman stated that they refused to arbitrate their civil claim; rather, they had selected the Delaware Securities Commissioner's Office to pursue their claim. (App. 55).

Also at the August 5 meeting, Tupman coerced OLDE, through prosecutorial/extortionist threats, to pay the Engelhardts the complete rescissionary value of their SNFS stock purchases. (Resp. App. 4a). If OLDE did not pay the Engelhardts full rescission, Tupman warned the OLDE representatives that they should consider the exponential costs and difficulties it would experience, including: adverse publicity; expanded investigation of OLDE with additional costly and time-consuming discovery requests and subpoenas; and notification to other regulators who, in turn, would also investigate OLDE's sales of SNFS stock to residents in their respective states. (Resp. App. 6a-7a).

Just as a private attorney would meet with his or her client to discuss settlement proposals, Tupman subsequently met with the Engelhardts to convey OLDE's settlement offer to them in the

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4. Cites to "Resp. App." refer to respondent's Appendix attached hereto.

amount of $20,375. (App. 56). The Engelhardts instructed Tupman that they rejected OLDE's offer and wanted the state to go forward with its case. (App. 56). Moreover, Tupman characterized as "baffling," OLDE's claim of its contractual right to arbitrate the Engelhardts' dispute and the federal preemption of Delaware's private rescission remedy. (App. 7).

OLDE insisted upon its federal right to arbitrate the Engelhardts' private claim and served the Engelhardts with a written demand to arbitrate their dispute, pursuant to their contract. (App. 7, 55). In turn, petitioner Hubbard issued the Notice which included the demand for rescission of the Engelhardts' SNFS stock purchases. (App. 7, 57). Tupman viewed OLDE's (contractually mandated) demand for arbitration as an attempt to "pressure" the Engelhardts into arbitration, and suggested that it was evidence of OLDE's bad faith, since he had disagreed with OLDE's legal position. (App. 56).

Facing the prospect of an administrative proceeding which would resolve the Engelhardts' private dispute with OLDE, thereby frustrating and avoiding OLDE's federal substantive right to arbitrate that dispute, OLDE chose to protect that right by commencing this action.[5] As here relevant, OLDE's Verified Complaint sought a preliminary injunction to halt petitioner's pursuit of rescission for the Engelhardts in his administrative proceeding, ostensibly authorized by the Delaware Securities Act, Del. Code Ann. tit. 6, §7325(b).[6] As pursued by petitioner,

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5. The court below held that petitioner's administrative proceeding would serve merely as a "substitute for the arbitration." (App. 18).

6. Beyond the preliminary injunction which is the subject of this appeal, the district court granted no further relief. An Amended Verified Complaint was later filed, which included alleged violations of the Civil Rights Act, 42 U.S.C. § 1983 and civil "RICO," 18 U.S.C. §§ 1961-1968. Trial on the remaining counts is now scheduled for September, 1994.

§ 7325(b) would circumvent OLDE's right to arbitration under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), and thus would violate the Supremacy Clause. (App. 8).

At the preliminary injunction hearing, in which Tupman appeared on behalf of and represented himself, petitioner Hubbard and the Engelhardts, the district court took evidence in the form of affidavits and numerous supporting documents, along with assertions/admissions by Tupman and argument from counsel. Tupman admitted in open court that these circumstances and events were "very well memorialized" and the only issue concerned the conclusions to be drawn from them. The district court, in its Memorandum Opinion, noted that the material facts were not in dispute. (App. 49). By Order dated September 16, 1992, the district court enjoined petitioner from pursuing a rescission action under § 7325(b) of the Delaware Securities Act on behalf of the Engelhardts, since their arbitration agreement with OLDE is enforceable under the Federal Arbitration Act, 9 U.S.C. § 2. (App. 75). The court declined to abstain and held that the FAA preempted the private rescission remedy of the Delaware Securities Act, § 7325(b). (App. 9, 66).

Signally, contrary to the implication of the petition, the district court did not enjoin petitioner from investigating OLDE or from pursuing administrative remedies other than private relief on behalf of the Engelhardts. (App. 21). The preliminary injunction for which the petitioner seeks review did *not* infringe upon or interfere with the state's proper role, interest or traditional state objectives in securities law enforcement. The petitioner was enjoined only from pursuing administrative proceedings and private remedies which pose obstacles to the full purposes and objectives of Congress in adopting the FAA. (App. 17, 21, 66-67).

The court below affirmed on two different grounds, holding: (1) that the FAA preempts petitioner's authority under Delaware

law to pursue private administrative relief in these circumstances, and (2) that principles of contract law preclude petitioner from pursuing private remedies in an administrative proceeding which would interfere with and "end run" around the terms of a valid arbitration agreement. (App. 3, 34). The court below also unanimously affirmed the district court's decision to intervene (rather than abstain).[7] The petitioner's authority under the Delaware statute is preempted since it authorizes relief directly in conflict with rights secured by the FAA, and necessarily presents an exception to the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971). The two independent grounds for the decisions by the court below are amply supported by the record, are consistent with the law favoring arbitration and therefore should not be disturbed.

REASONS FOR DENYING THE WRIT

The court of appeal's decision does not present any question which warrants review by this Court. That decision reaffirmed and applied well-settled authority on the strong federal policy favoring arbitration. An integral component of that policy, as embodied by the decision below, is that states may not disfavor arbitration by compelling the resolution of arbitral disputes into alternative state-mandated forums. In this regard, the petition raises no issue that merits review. Rather, the petition offers case-specific, fact-driven issues which have already been decided adversely to petitioner by both the district court and the court of appeals.

Reexamination of the substantial record and detailed analysis supporting the lower court's affirmance of the order of preliminary injunction is a factbound task that does not warrant certiorari. The petition raises no substantial question of law. There is no conflict in the lower courts. This case merely represents a new variation on an

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7. Petitioner's request for rehearing *en banc* was also denied.

old theme: state interference with federal substantive rights to arbitration.

I.

THE PETITION RELIES ON NEW FACTUAL ASSERTIONS TO THE EXCLUSION OF THOSE FOUND BY THE DISTRICT COURT AND THE COURT OF APPEALS.

The findings of fact below were concededly uncontroverted; and the District Court noted that the material facts were not in dispute. (App. 49). The Court of Appeals also concurred in the factual findings. Petitioner now improperly takes issue with the findings of fact, offers new facts which are not in the record below and suggests that some of the findings were "erroneously labeled 'undisputed'." (Petition for Writ of Certiorari, hereinafter "Pet." 5). Signally, petitioner never sought reconsideration of the findings in the district court. Now, in hindsight, petitioner inappropriately requests this Court to review evidence, take new "evidence" and discuss specific facts. The petition is ill-advised in that it seeks review of a decision which presents primarily a question arising out of the particular facts involved. For this reason alone, the petition is improvident and should be denied. *National Labor Relations Board v. Hendricks County Rural Electronic Corp.*, 454 U.S. 170, 176, n. 8 (1981); *Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.).

Beyond its omission of the central, relevant facts and circumstances upon which the decisions rest, the petition offers new "facts" in an attempt to controvert the heretofore "undisputed" facts. For example, the petition takes issue with a factual finding concerning the Engelhardts' investment objectives, offering new hearsay allegations in a belated attempt to rebut the findings. (Pet. 5, n. 2). Similarly, the petition claims that the court of appeal's description of OLDE's business in 1990 is incorrect. In support of

its assertion, the petition references a brochure, allegedly sent by OLDE to Delaware residents in August 1993, more than three years after the relevant period encompassed by the Engelhardts' 1990 stock transactions. (Pet. 6, n. 3). The referenced "brochure" is found nowhere in the record below, which explains petitioner's lack of citation to the record on this new factual assertion. The petition also takes issue with the district court's finding that OLDE's settlement offer would have fully compensated the Engelhardts for their loss in SNFS during the period they held their stock at OLDE, suggesting that the court overlooked other "facts" now offered in the petition. (Pet. 9, n. 5). These examples demonstrate petitioner's displeasure with the "undisputed facts." In this regard, the petition raises fact-driven issues and therefore should be denied.

II.

THE DISTRICT COURT AND THE COURT OF APPEALS APPLIED THE PROPER PREEMPTION ANALYSIS IN THAT PETITIONER'S IMPLEMENTATION OF DELAWARE LAW INTERFERES WITH FEDERAL ARBITRATION RIGHTS GRANTED BY THE FAA.

Given the peculiar facts and circumstances of this case, both lower courts correctly found that federal preemption was appropriate, in that petitioner's pursuit of private remedies in an administrative forum would interfere with and create an obstacle to OLDE's federal rights under the FAA. Delaware created a statutory scheme which, as implemented by petitioner here, circumvents and forecloses federal arbitration rights. The aggravating record below demonstrates that petitioner's Notice was issued solely to assert and adjudicate the Engelhardts' civil claim in the administrative forum, in retribution for OLDE's failure to settle that single claim on terms demanded by Tupman, in

violation of OLDE's federal substantive right to arbitrate that dispute. The court of appeals correctly perceived the state-created conflict, noting that petitioner sought to "adjudicate administratively the very same [claim] that the Engelhardts themselves could pursue only within an arbitration." (App. 17).

This Court has historically and routinely accorded preemptive effect to the FAA, invalidating state laws that discriminate against, circumvent or create obstacles to the enforcement of federal arbitration rights. *See generally Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Perry v. Thomas*, 482 U.S. 483 (1987); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. __, 111 S. Ct. 1647 (1991). *See also Osterneck v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 841 F.2d 508 (3d Cir. 1988); *Securities Industry Assoc. v. Connolly*, 883 F.2d 1114 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990).

Although petitioner disagrees with the preemptive force of the FAA, the petition ignores the longstanding preemption rationale which was correctly applied by the courts below. Rather, in a desperate attempt to incite interest, the petition incorrectly states that the decision below "blatantly disregards" this Court's holding in *Gilmer, supra.* (Pet. 14). Contrary to this bald assertion, both the district court and the court of appeals below expressly considered and followed the teachings of *Gilmer.* (App. 62-63, 15, 19-20, 42-43). In *Gilmer,* this Court rejected any contention that the involvement of a federal administrative agency (Equal Employment Opportunity Commission) in a statutory scheme of enforcement was sufficient to preclude arbitration of those claims. In the face of this clear and expansive holding, petitioner clings to *dicta* in that decision which stated that the EEOC is not precluded

from bringing an action seeking "class-wide and equitable relief." *Gilmer,* 111 S. Ct. at 1655.

However, petitioner's reliance upon that language has no relevance to the facts in this case. Significantly, as the court below noted, petitioner was *not* seeking "class-wide equitable relief" in the Notice issued against OLDE. (App. 20, n. 5). Rather, petitioner's Notice expressly sought rescission specifically on behalf of the Engelhardts, a claim which was bound to arbitration. The court below considered and correctly rejected petitioner's contention that *Gilmer* establishes that the state's interest in the private remedy of rescission should be given "special exemption" from traditional preemption principles. (App. 20). Simply, the issue of "class-wide relief" in the context of federal arbitration rights will not be before this Court if the petition is granted.

Similarly, petitioner's "distinction" between restitution and damages, and the so-called "public interest" in the remedy of rescission are both illusive under these circumstances. (Pet. 18, 23-24). In *Gilmer,* this Court expressly considered and dismissed such veiled distinctions. Specifically, in the context of a private claim which the Court held was required to be decided in an arbitral forum, the Court noted:

> It is true that arbitration focuses on specific disputes between the parties involved. The same can be said, however, of judicial [administrative] resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important *public policies,* but, as noted above, claims under those statutes are

> appropriate for arbitration. "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial [private interest] and deterrent [public interest] function." *Gilmer, supra,* at 1653 (emphasis supplied), citing *Mitsubishi, supra,* at 637.

Clearly, the totality of the factual record below demonstrates that petitioner's institution of the administrative proceeding against OLDE was not in the "public interest," but was instead instituted solely *on behalf of* the Engelhardts, as the district court found. (App. 75). The private claim which petitioner was pursuing on behalf of the Engelhardts in the administrative proceeding would clearly be subject to arbitration if pursued directly by the Engelhardts themselves. Tupman, as Deputy Attorney General, using the power of his title and office was, in effect, the *de facto* attorney for the Engelhardts.

The court below correctly held that preemption was appropriate, given the "community of interest" among petitioner, Tupman and the Engelhardts, which "implicitly demonstrates that the administrative proceedings are an obstacle to Congress' purpose in adopting the FAA." (App. 17). Simply put, preemption was necessary since petitioner was attempting to do indirectly what the Engelhardts could not do directly (*i.e,.* avoid arbitration).[8]

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8. Petitioner's reliance upon *Porter v. Warner Holding Co.*, 327 U.S. 395 (1946) and *Kelly v. Robinson,* 479 U.S. 36 (1986) is misplaced. In *Porter,* the tenants who benefitted from an award of restitution could *not* have brought their own private actions to recover rent overpayments. In contrast, the Engelhardts could have brought their own claims, in arbitration, but were relying on petitioner "to obtain a remedy that would frustrate the arbitration." (App. 17). Although neither case concerned federal arbitration rights, both cases involved *bona fide* government proceedings seeking "class-wide" as opposed to singular equitable relief.

Moreover, contrary to the petitioner's suggestion, the state putative "public interest" will not be substantially interfered with by the decision below. In this regard, the district court did not enjoin petitioner from pursuing any other administrative remedies; only private rescission of the Engelhardts' purchases.[9] Therefore, petitioner retains many avenues for its pursuit of proper state objectives in securities law enforcement.

Petitioner stretches the boundary of plausible argument in suggesting that the decision below is "incorrect." (Pet. 21). Specifically, petitioner takes issue with the decision below which effectively held that the federal right to arbitrate would be "meaningless" if petitioner could order private rescission to the Engelhardts in the administrative proceeding. Fundamentally and practically flawed, petitioner suggests that OLDE might still derive a "great benefit" from its arbitration agreement even if petitioner were allowed to order rescission on behalf of the Engelhardts. (Pet. 21). Such an illogical contention was correctly dismissed by the court below. (App. 16-19).

The reality is that the Engelhardts did not initiate an arbitration claim against OLDE as required by their arbitration agreement. Rather, as the court of appeals observed, they relied upon petitioner and Tupman to obtain a private remedy which would circumvent the arbitration. (App. 17). Petitioner's suggestion of harmony between the state's private rescissionary statute and the FAA is "illusory," as found below. (App. 18). If, for example, petitioner awarded rescission to the Engelhardts in his administrative proceeding, clearly there would be no arbitration of the dispute, since the Engelhardts would receive full rescission in the administrative proceeding. In such a case, OLDE's federal right to arbitrate would be meaningless.

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9. As discussed at pp. 16-17, 21 below, this argument is a "red herring" since, in this particular case, there was no issue of state or public interest; any such interest having been resolved. (App. 6-7).

Moreover, as the court below correctly observed, if forced to defend the Engelhardts' claim in the state's administrative proceeding, OLDE "would be deprived of its right to the presumed simplicity and efficiency of the arbitral forum." (App. 19). Therefore, the private rescission remedy, as implemented here by petitioner on behalf of the Engelhardts, would completely eviscerate OLDE's federal arbitration right. The court below correctly held that the state's private rescission remedy is preempted by the FAA since it "presents an obstacle to the accomplishment of the congressional purpose of enforcing arbitration agreements, and because it is impossible to give effect to both the administrative rescission remedy and the federal right to arbitration." (App. 19). The decision is consistent with the broad and unbroken line of decisions by this Court favoring arbitration in the face of a state's attempt to bypass federal rights to arbitrate.

III.

THE FAA REQUIRES ENFORCEMENT OF ARBITRATION AGREEMENTS AGAINST NON-SIGNATORIES TO THE AGREEMENT.

Petitioner contends, without citation to any authority, that since he was not a party to the arbitration agreement, he cannot be bound by its terms. (Pet. 13, 22). This concept was, contrary to the petition, *not* ignored. The court below considered this point, but did not alter its decision. Reminiscent of this Court's opinion in *Moses H. Cone Memorial Hospital,* the court of appeals stated that under the FAA "an arbitration must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement." (App. 18), citing, *Moses H. Cone Memorial Hospital, supra,* 460 U.S. at 20. Numerous other federal court decisions have held that nonsignatory agents of principals are bound by the terms of the arbitration agreement. *See generally Barrowclough v. Kidder, Peabody & Co., Inc.,* 752 F.2d

923 (3rd Cir. 1985) (employee and nonsignatory contingent beneficiaries bound by arbitration agreement); *Letizia v. Prudential Bache Securities, Inc.*, 802 F.2d 1185 (9th Cir. 1986) (employees/agents who were nonsignatories to a customer brokerage agreement could be bound by the arbitration clause); *In Re Oil Spill by Amoco Cadiz, et al.*, 659 F.2d 789 (7th Cir. 1981) (nonsignatory agent bound to arbitration where purposes of FAA would not be advanced if agent were allowed to disavow principal-agent relationship for purposes of arbitration).

The court below had ample evidence upon which to conclude that petitioner was acting as agent of the Engelhardts, parties to the arbitration agreement, and therefore bound by its terms. First, the district court necessarily found that petitioner was expressly pursuing private rescissionary relief "on behalf of the Engelhardts." (App. 75, 67). Indeed, the administrative proceedings were instituted based solely upon the Engelhardt's complaint; the Notice itself was predicated exclusively upon the dispute between OLDE and the Engelhardts. (App. 17, 20, n. 5).

The record below fully supports the conclusion that petitioner's administrative proceeding would merely be a substitute for the arbitration. (App. 18). There was no "public interest" in the state's pursuit of private relief for the Engelhardts. Tupman had agreed to accept OLDE's $15,000 contribution to the Investor Protection Fund to resolve any putative state public interest. (App. 7), (Resp. App. 4a). The purpose of the administrative proceeding was to pursue the private interests of the Engelhardts, which the district court found. (App. 75).

The principal-agent relationship among petitioner, Tupman and the Engelhardts was described by the court below as a "community of interest" in the Engelhardts' complaint. (App. 17). Not unlike a private attorney, Tupman met with the Engelhardts to discuss OLDE's settlement proposal. (Resp. App. 13a). The

Engelhardts instructed Tupman to proceed with the administrative proceedings and, in retaliation for OLDE's demand to arbitrate the dispute, Tupman and petitioner instituted the proceedings.[10] Before the district court, Tupman *refused* to bifurcate the state's pursuit of rescission for the Engelhardts (a private interest) from the remainder of the administrative proceeding (the public interest). (App. 26, n. 9). Furthermore, as the court below also recognized, Tupman filed the appeal on behalf of the Engelhardts, who were not represented by separate and independent counsel on either the appeal or in the earlier settlement negotiations with OLDE. (App. 17).

Based upon this abundance of evidence, it is clear that petitioner and his agent Tupman stepped into the shoes of the Engelhardts and instituted administrative proceedings not for any "public purpose," but solely to pursue private rescission for the Engelhardts. Without the district court injunction, the Engelhardts, through the assistance of their agents, petitioner and Tupman, acting through the subterfuge of the administrative proceeding, would have been able to "end run" around the arbitration. Such a result would defeat the FAA's fundamental purpose: a national policy which favors arbitration and withdraws the power of states to require an alternative forum for the resolution of claims which the parties agreed to resolve by arbitration. *Southland Corp., supra,* 465 U.S. at 10.

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10. Curiously, Mr. Tupman has not joined in this petition, notwithstanding findings that his actions were not on behalf of the state, but on behalf of the private interests of Mr. & Mrs. Engelhardt. (App. 17).

IV.

IN CIRCUMSTANCES WHERE A STATE STATUTORY REMEDY IS IMPLEMENTED BY STATE OFFICIALS TO CIRCUMVENT FEDERAL RIGHTS TO ARBITRATION, THE FAA NECESSARILY PROVIDES AN EXCEPTION TO THE *YOUNGER* ABSTENTION DOCTRINE.

The district court and the court of appeals concluded that the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) was not applicable to OLDE's claim of federal entitlement to arbitration under the FAA. (App. 3). Petitioner's suggestion that the court below "carved out a new exception for FAA preemption claims" is incorrect. (Pet. 25). Rather, the court appropriately balanced the confrontation between the normal limits of *Younger* abstention against the "highly favored" and congressionally mandated right to arbitration. (App. 30). The court below resolved the collision between these two competing interests in favor of arbitration, since deference to the petitioner's administrative proceeding would present a significant and immediate potential for irreparable harm to the federal interest asserted. (App. 25-26), citing *Wooley v. Maynard*, 430 U.S. 705, 710 (1977); *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 626 (1986); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965).

In these unusual circumstances, where petitioner instituted administrative proceedings, yet OLDE, under the auspices of the FAA, is guaranteed in the first instance an arbitral forum in which to resolve the Engelhardt's dispute, the delay inherent in waiting for guidance from the state appellate court *after* petitioner's administrative proceeding is concluded would necessarily result in great and immediate irreparable injury, since OLDE's federal right would be rendered meaningless and lost forever. *Id.* Therefore, the

courts below properly intervened to protect OLDE's rights under Section 2 of the FAA.

This Court has instructed that the doctrine of abstention "is an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it . . . ." *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813 (1976). Therefore, "[a]bstention rarely should be invoked." *Ankenbrandt v. Richards,* 504 U.S. __, 112 S. Ct. 2206, 2215 (1992).

There can be no dispute, as the district court noted, that petitioner (and Tupman) were "engaged in a course of action openly inconsistent with [OLDE's] rights under Section 2 of the FAA . . . ." (App. 30). In these circumstances, OLDE cannot be turned away from federal court by petitioner's expedient invocation of *Younger* abstention. The very nature of OLDE's contractual right, as sanctioned by the FAA, is to have claims addressed in an arbitration forum in the first instance. The court below correctly observed that if the district court abstained in this case, it would be refusing to protect, and OLDE would suffer immediate irreparable harm to, federal rights established by the FAA. (App. 27-28).

Petitioner's argument, rejected below, would obviously evade federal arbitration rights rendering those rights meaningless.

Petitioner's insistence upon pursuing administratively, a private rescission remedy in conflict with OLDE's right to an arbitral forum under the FAA presents "the very unusual situation that an injunction is necessary to prevent great and immediate irreparable injury." *Ohio Civil Rights Commission, supra,* at 626.

Hence, the court below correctly noted that OLDE's procedural right to an arbitration forum is "raised to a substantive

right by the FAA." (App. 28). The district court appropriately intervened to uphold and protect that right. This Court intervened in a similar case where a person bound to arbitration ignored and avoided the arbitration requirement and instead resorted to the courts. *Southland Corp., supra,* 465 U.S. at 6-8. *Southland* instructs federal courts not to stand idle while the FAA's mandate is evaded. (App. 28).[11]

Beyond the reasons articulated by the court below, the record fully supports intervention for another reason as well. Important state interests implicating *Younger* are not raised in circumstances as here, where state officials abuse state process to violate federal constitutional and statutory rights. *Heritage Farms, Inc. v. Solebury Township,* 671 F.2d 743, 748 (3rd Cir. 1982), *cert. denied,* 456 U.S. 990 (1982); *Gwynedd Properties, Inc. v. Lower Gwynedd Township,* 970 F.2d 1195, 1202 (3rd Cir. 1992). The abusive manner by which these proceedings have been pursued overshadows any legitimate interest which the state might otherwise have in the enforcement of the underlying statute. Although Delaware may have an important interest in policing the securities industry, that interest is not furthered (or even served) by petitioner's (and prosecutor Tupman's) use of the Delaware Securities Act as an implement for coercing private settlements on behalf of investors who are otherwise bound to arbitrate their claims. As in *Gwynedd Properties* and in *Heritage Farms,* the

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11. The pervasive and expansive enforcement of arbitration rights and the need for federal intervention when arbitration rights are challenged, can be gleaned from the congressional intent reflected directly in the FAA, 9 U.S.C. § 16. That section, entitled "Appeals," provides that while orders compelling arbitration are not immediately appealable, orders denying requests to compel arbitration are immediately appealable. The court below noted that "[t]his dichotomy reflects the paramount importance that Congress has placed on arbitration . . . [granting] the Courts of Appeals broad authority to ensure that district courts are not circumscribing the rights granted by the FAA . . . ." (App. 29).

conduct here is so outrageous as to transcend any putative state interest which might otherwise justify federal abstention. Moreover, *Younger* has always excepted from its scope those state proceedings that are not "good faith attempts" to enforce a state statute. *Younger, supra,* at 54.

Finally, the district court's intervention was carefully limited to protect OLDE's federal rights to arbitration, but did not interfere with petitioner's putative public interest in state securities law enforcement. The court of appeals noted this limitation approvingly, as well. (App. 20-21, 36, n.1). The order of preliminary injunction did not usurp the state's power to enforce its securities law generally, nor did it restrain petitioner's administrative proceedings against OLDE. The decision to intervene was vital since "delayed enforcement destroys the federal statutory right." (App. 31).

CONCLUSION

For the foregoing reasons and controlling authorities, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

The attached documents, part of the record below, were referenced and relied upon by the district court and court of appeals in reaching their decisions. (App. 7, 17, 53-56).

APPENDIX A — JOINT VERIFIED STATEMENT

Joint Verified Statement

This Verified Statement is subscribed and sworn to jointly by Randal J. Mudge, Bruce A. Campbell and J. Richard Tucker based upon their personal knowledge and belief.

On August 5, 1992, a meeting took place between representatives of the Office of the Attorney General of the State of Delaware and OLDE Discount Corporation ("OLDE"), a broker-dealer. The meeting was held at the request of OLDE. Deputy Attorney General W. Michael Tupman and securities Investigator F. Gregory Gause, Jr. attended the meeting on behalf of the State of Delaware. Randal J. Mudge, Managing Director and CEO of OLDE, Bruce A. Campbell, Corporate Attorney and J. Richard Tucker, special counsel, attended on behalf of OLDE. The meeting commenced at approximately 10:30 AM at the offices of Mr. Tupman in Wilmington, Delaware.

At the outset of the meeting, Mr. Tupman referred to a recent broker-dealer revocation action instituted by the State against another securities brokerage firm. Mr. Mudge responded and presented a brief history of OLDE in order to distinguish OLDE from the firm whose broker-dealer registration had recently been revoked by the State Securities Commissioner. In response, Mr. Tupman stated in substance that:

> We do not consider you [OLDE] to be in the same class as that firm, we consider Hibbard Brown to be at one end of the spectrum and OLDE to be at the other end. It is because we consider you to be at the level of the most honorable of firms, that we have a higher standard for you and we have greater expectations from you.

Mr. Tucker then stated that he did not believe or understand that Donohoe's alleged conduct to be fraudulent, and that the alleged omissions concerning the impact of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, enacted August 9, 1989 ("FIRREA"), on Second National Federal Savings ("SNFS"), (as contained in the draft Notice sent to OLDE by Mr. Tupman) were harmless omissions, even if it was omitted from Donohoe's discussions with the Engelhardts. Mr. Tucker noted that conditions in the Savings and Loan Industry as well as the U.S. government's efforts to improve the capital for thrifts were common knowledge because they had been enacted almost a full year before the Engelhardts' purchases and were the subject of daily writings and discussions by both the print and broadcast media. In response, Mr. Tupman stated in substance that:

> The Engelhardts are unsophisticated investors and they would have needed such an explanation.

The conversation then turned to the issue of the State pursuing penal sanctions at the same time it was negotiating a civil settlement on behalf of the Engelhardts. OLDE representatives urged the State to bifurcate its enforcement activities from the interests of the Engelhardts by accepting OLDE's offer of settlement which had previously been negotiated with the State (i.e. payment of $15,000.00 to the Delaware Investors Protection Fund in return for the State closing of its files without the filing of any complaint). In response, Mr. Tupman stated in substance that:

> Oh you brokers would love nothing more! You brokers 'never' respond to customer complaints! You never pay off complaining clients, you force customers to sign arbitration

> agreements and you always force the claimants to go to arbitration which is stacked against them! Brokerage clients cannot go to lawyers for redress in the courts because (1) it takes forever; (2) the clients get terrible results; (3) the clients have the costs of litigation, including legal fees; and (4) you brokers would love nothing more than to force a client into a settlement! The Engelhardts are not going to arbitration and they are not going into the state or federal courts because, as I said earlier this morning, they have chosen their remedy which is rescission under Section 7325(b) of the Delaware Code!

OLDE representatives once again reiterated its offer to pay a fine or penalty in the amount of $15,000.00 to the Delaware Investor Protection Fund, to settle the charges without publicity or any formal proceeding, particularly since the State agreed that the alleged misconduct did not amount to securities fraud, because the State offered to close its files without the filing of any public notice or action in return for such payment, and OLDE considered the absence of adverse publicity to be advantageous. In response, Mr. Tupman stated in substance that:

> We can understand why you would like to avoid the bad publicity, but we will settle with you only if you repay the Engelhardts in full ($52,875.00).

OLDE representatives inquired as to whether the State had any disagreement with the portion of the settlement which included the payment of $15,000.00 to the Delaware Investors

Protection Fund. In response, Mr. Tupman stated in substance that:

> No, as we have stated, we are in agreement on that. OLDE's proposed contribution is acceptable. The only remaining question is whether rescission or restitution for the Engelhardts is appropriate. We believe that rescission in the amount of $52,875.00 is appropriate.

Mr. Tucker stated that the application of amended Section 7325(b), in the contemplated matter, was inappropriate for two reasons. First, the alleged misconduct occurred prior to the Delaware legislature's enactment of amended Section 7325(b) and that such an application would amount to a violation of the due process clauses of the U.S. and Delaware Constitutions as an *ex post facto* law. Second, OLDE representatives suggested that the imposition of such a remedy was in violation of the Due Process clauses of both the U.S. and the Delaware State Constitutions if, as it appeared, the office of the State Attorney General was, in effect, forcing the settlement of civil litigation (with the Engelhardts) by threatening penal actions including fines and revocation of OLDE's broker-dealer registration, unless OLDE paid the amount demanded by the State to settle any potential civil litigation with the Engelhardts. In response, Mr. Tupman stated in substance that:

> Delaware is one of the few jurisdictions which have such (rescission/restitution) legislation and we intend to pursue it vigorously even if those other jurisdictions don't want to help their citizens. None of the other States and none of the self-regulatory bodies are imposing such remedies and I am the only one who is

> doing my job. I certainly resent you coming in here and giving me a first year law student lecture. We [the office of the securities Commissioner] have recently upheld this Section in the Hibbard Brown matter and this is the law in Delaware, even though that decision is now being appealed from the Administrative process to the Delaware Court of Chancery, this is the law in Delaware!

OLDE representatives then suggested that the State Attorney General was in an awkward ethical dilemma. It appeared as if Mr. Tupman was providing private legal advice to the Engelhardts [by advising them concerning OLDE's settlement offer to them and counselling that they ignore OLDE's offer and pursue a remedy under amended Section 7325(b)], while simultaneously purporting to act as the State's lawyer [which has somewhat different interest from those of the Engelhardts] in its ostensible pursuit of penal enforcement proceedings against OLDE. In response, Mr. Tupman stated in substance that:

> We will have to terminate this meeting. If you are suggesting that I am doing something unethical then you are really skating on thin ice! I am a representative of the State and I resent you implying that I would do anything unethical, and if you are suggesting that I am, then we will terminate this meeting!

OLDE representatives then suggested that the Engelhardts had failed to mitigate any damages which may have been caused by OLDE or its agents, if in fact OLDE's actions resulted in any damages, and that no court or arbitrator would be likely to

conclude, as a matter of law, that OLDE should pay the full amount of $52,875, even if there was a finding of liability. Accordingly, the State's insistence upon rescission of the total amount that the Engelhardts invested was tantamount to OLDE becoming a guarantor of the performance of its clients' investments. Therefore, management of OLDE, while expressing a desire to resolve this matter through settlement, couldn't justify such resolution under the patently unreasonable economic terms demanded by the State. In response, Mr. Tupman stated in substance that:

> I am not certain you have considered the economics of the exponential difficulties which you will experience if you do not accept the State's offer. First, there will be adverse publicity for OLDE. Have you considered the exponential costs of responding to all of the fifty states when we notify them of our action, and to the Exchanges and the other self-regulators? You will have to amend your U-6 (Uniform Registration Form) with all the regulators, in order to notify them of the institution of our action and again with the results of our Proceedings. We will expand this investigation with respect to Delaware residents and the other states will investigate OLDE's sales of SNFS in their states. We will file additional discovery requests and issue subpoenas which will be time consuming and costly for you to answer. It will be very costly if we conduct a full-bore SNFS investigation. When you consider the exponential effect and the economics of all of those actions, then

> maybe you will think that our offer is not so unreasonable and you will accept it (to avoid these consequences).

In closing, Mr. Tucker indicated that there would be a letter following this meeting which letter would memorialize the points made during the meeting. In response, Mr. Tupman stated in substance that:

> I strongly advise that a letter memorializing our meeting should not be sent! Why would you do that? You do not want to do that. You indicated that you didn't want publicity and I could not protect such a letter under the Freedom of Information Act ("FOIA"). I could protect our previous correspondence under FOIA, but I would be unable to protect a letter confirming this meeting. I would not appreciate disclosure of my deliberative process.

Nevertheless, shortly after the meeting, OLDE delivered to Mr. Tupman a letter dated August 5, 1992 which memorialized the substantive points raised by OLDE representatives in their meeting with Mr. Tupman and Mr. Gause. A copy of the letter delivered to Mr. Tupman is contained in the Appendix Exhibit J.

Appendix A

JOINT VERIFICATION

The undersigned: Randal J. Mudge, Chief Executive Officer of the plaintiff; Bruce A. Campbell, Corporate Attorney of the plaintiff; and J. Richard Tucker, an outside attorney and consultant to the plaintiff hereby verify, under the penalty of perjury under the laws of the United States of America, that the undersigned have read the attached joint verified statement and the statements contained therein are true and correct.

/s/	/s/	/s/
Randal J. Mudge	Bruce A. Campbell	J. Richard Tucker

APPENDIX B — AFFIDAVIT OF MICHAEL TUPMAN

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

CivilAction No. 92-498

OLDE DISCOUNT CORP.,

Plaintiff,

v .

W. MICHAEL TUPMAN, Deputy Attorney General, and RICHARD W. HUBBARD, Securities Commissioner of the State of Delaware,

Defendants.

AFFIDAVIT OF W. MICHAEL TUPMAN

STATE OF DELAWARE

NEW CASTLE COUNTY : ss

W. MICHAEL TUPMAN, being duly sworn, states as follows:

1. I am a Deputy Attorney General in the Securities Division of the Delaware Department of Justice. I make this affidavit in opposition to the motion of Olde Discount Corporation ("Olde Discount") for a temporary restraining order and preliminary injunction. I have personal knowledge of all of the facts set forth herein.

Appendix B

2. In July 1991, the Securities Division received a complaint from a Wilmington couple (the Engelhardts) against Olde Discount and one of its former agents, Michael Donohoe, with regard to the purchases of stock in Second National Federal Savings Bank in May and June of 1990. The Engelhardts had lost almost their entire investment in those securities ($52,000). The Division sent a letter to the firm on July 31, 1991 asking for their response, in writing, to the complaint. By letter dated October 24, 1992, the firm responded denying that Donohoe had made any misrepresentations or failed to disclose material facts in connection with those sales of stock, or otherwise violated the state securities law.

3. Then followed a Series of requests for documents and information from Olde Discount over the course of December 1991-April 1992. Among other things, by letter dated February 6, 1992, the Division asked for a list of all Delaware investors who bought SNFS stock from Olde Discount in 1989 and 1990; the State had good reason to believe that there might have been other Delaware residents victimized by Donohoe. Olde responded, however, by saying that "our computer system is unable to generate such a list . . . . Manually generating such a list by state would be very time-consuming. If this information is vital to your investigation we will provide it. Please advise."

4. During a telephone conversation with Olde Discount's corporate counsel (Bruce A. Campbell), Mr. Campbell asked if I would notify him in advance of taking any action against the firm (if any were contemplated), to allow Olde a further opportunity to respond to any allegations. I agreed to extend Mr. Campbell this courtesy.

5. By late May 1992, the Division had completed its

investigation of the Engelhardts' complaint, and determined that there was probable cause of as many as fifteen violations of the Delaware Securities Act. Rather than recommending to the Commissioner that charges be issued at that time, however, I sent a draft of the charges to Mr. Campbell by overnight courier on June 5, 1992. Mr. Campbell then called to ask that I take no further action until Olde had a chance to review the charges, and I agreed.

6. In a telephone conference on July 13, 1992, Olde Discount made a settlement offer that would have paid the investors less than half of their investment loss. On July 17, 1992, I countered their offer asking for rescission of the stock trades (any settlement being subject to the approval of the Commissioner). Olde Discount then asked to meet with me in Wilmington and I agreed. The meeting took place on August 5, 1992 in the offices of the Securities Division.

7. I attended that meeting with one of my investigators, F. Gregory Gause, Jr. (The Commissioner did not attend that meeting, or otherwise participate in any way in the settlement negotiations.) Olde Discount was represented by a Richard Tucker, who purported to be advising them on issues of Delaware law, but I later learned that he is not admitted to practice in this State. Far from a negotiation, it quickly turned out that Olde Discount was only there to reiterate its previous settlement offer. Mr. Tucker stated his opinion that the State had less than a "ten percent" chance of prevailing on the merits, and expounded on various legal defenses such as pre-emption. He referred to the Delaware Securities Act as "dysfunctional," and suggested that the Division should simply ignore its statutory mandate and do nothing to help individual investors. Mr. Tucker also suggested that I had been providing legal advice to the Engelhardts, which I categorically denied because that is false. At no time, before or

after that meeting, have I ever purported to provide legal advice to the Engelhardts.

8. It is not true, as stated in Olde's Joint Verified Statement, that the State had "agree[d] that the alleged misconduct did not amount to securities fraud." In drafting and then issuing the notice of intent, the State clearly had found probable cause of numerous violations of the Delaware Securities Act. As to any alleged "threats," at no time did I ever threaten to recommend that an administrative proceeding be brought in order to try to force a settlement. Indeed, the charges had already been drafted, and it was only to accommodate Olde's request that the State delayed in issuing the charges.

9. As in any settlement negotiations of this kind, the respondents often ask that the matter be kept confidential. As I explained to Olde Discount at the meeting in Wilmington, as a public agency the Securities Division cannot cloak its activities in secrecy, since we are subject to such statutes as the Freedom of Information Act. In addition, I explained to them that because of the reciprocal system of enforcement under the Uniform Securities Act, any administrative proceeding in Delaware would necessarily be public. Accordingly, if we were not able to come to some sort of agreement before charges issued, it would be virtually impossible to negotiate at some future point about this issue.

10. After the settlement meeting, the Division learned for the first time that despite Olde Discount's repeated misrepresentations to the contrary, the investors had complained in July 1990 to Olde Discount's home office in Detroit, Michigan, but had been told by a vice president of the firm that there was no basis for their complaint. This is an important fact, because Olde contends that if they had been notified of a complaint by the Engelhardts, they

would have been in a position (hypothetically) to have redressed the wrong at that time. Although Olde Discount's compliance manual requires that the firm maintain written customer complaint files, no record was created by the firm in this case.

11. I met with the Engelhardts on August 10, 1992 to inform them that Olde Discount had made a settlement offer. I emphasized that I was not their attorney and could not give them legal advice, and also that the final decision would rest with the Division and the Commissioner, since we had the larger public interest to consider. Nevertheless, we wanted their input, and I explained that there were two possible scenarios: either they could receive a sum certain now, or else go to a hearing, where the outcome was problematic. Even if the Commissioner ruled in their favor, that decision could be appealed, and they might not see any money for a long time. Both the Engelhardts emphatically agreed that they wanted the State to go forward with its case.

12. It was only at this meeting with the Engelhardts that the Division learned that on the very same day of the settlement conference in Wilmington, Olde Discount had served by hand-delivery on the Engelhardts a demand for them to invoke NASD arbitration, or Olde would do it on their behalf. Thus, while Olde Discount was purporting to try to settle the case, they were starting a "race to the courthouse" to try to initiate an NASD arbitration before the State commenced its administrative proceeding.

13. I wrote to Olde Discount on August 10, 1992 to bring this matter to their attention, and to reject the firm's final settlement offer. The Division also renewed its request (though much more narrowed in scope) of February 6, 1992 for a list of Delaware residents to whom Donohoe had sold SNFS stock during the seven months that he worked at Olde Discount.

Appendix B

14. At an impasse, with settlement negotiations completely broken down, the Division recommended to the Commissioner that a notice of intent to suspend or revoke broker-dealer registration be issued. The Commissioner agreed, and signed an order that same day giving Olde Discount thirty days to request a hearing on the matter. (A copy of the notice and order are attached to this affidavit as Exhibit 1.) To date, Olde Discount has not requested a hearing.

15. On August 17, 1992, the Department of Justice issued a press release concerning the notice of intent against Olde Discount and Donohoe after the charges had been filed. An article reporting the notice appeared the next day in the *News-Journal,* and in response to that article, the Division received a number of new complaints from Delaware investors who also had bought SNFS stock from Donohoe. In addition, the Division has contacted some other investors similarly situated, not to "foment" new complaints, as Olde Discount alleges (without any factual basis), but rather merely to inquire if they had any problem with their investment. The investigations are in accordance with the Division's statutory mandate.

16. On August 19, 1992, again pursuant to its standard operating procedures, the Division gave notice over a computer wire (known as the CRD) to all other state securities agencies of the pending disciplinary proceeding in Delaware. To date, the Division has not received a response from any other state. It is simply false for Olde Discount to allege (without any factual foundation) that the Division is "fomenting" disciplinary proceedings in other states.

Appendix B

/s/
W. Michael Tupman

Subscribed to and sworn
before me this 26th day
of August, 1992

/s/
Notary Public